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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 212

METROMEDIA, INC.,

Appellant,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Appellee,

and

UNITED STATES OF AMERICA.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

ROBERT A. DREYER
277 Park Avenue
New York, New York 10017

GEORGE A. KATZ
230 Park Avenue
New York, New York 10017

Attorneys for Appellant

WACHTELL, LIPTON, ROSEN, KATZ & KERN
Of Counsel

June 3, 1965

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

METROMEDIA, INC.,

Appellant,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Appellee,

and

UNITED STATES OF AMERICA.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant appeals from the order and judgment of the United States District Court for the Southern District of New York entered on March 25, 1964 denying its motion to punish appellee ("ASCAP") for civil contempt for refusing to comply with the Amended Judgment entered against ASCAP on March 14, 1950 in *United States of America* v. *American Society of Composers, Authors and Publishers,* Civ. No. 13-95, or alternatively, to direct the United States, as plaintiff in that action, to so move the Court.

Opinion Below

The District Court did not render an opinion. Its judgment was endorsed on the back of appellant's motion papers:

> "Motion denied. See record and transcript of proceedings; so ordered."

Jurisdiction

On February 26, 1941, the United States filed a civil antitrust action in the Southern District of New York against ASCAP. On March 4, 1941, a final consent judgment was entered in that action. On March 14, 1950 said judgment was amended. ("Amended Judgment")

The Amended Judgment included certain affirmative and negative injunctions regulating the conduct of ASCAP's business (licensing the performance of musical compositions) and established procedures for fixing reasonable fees to be paid by licensees of ASCAP music.

Appellant applied to the District Court to punish ASCAP for contempt for its refusal to comply with the Amended Judgment, or alternatively, to direct the Government so to do. On March 25, 1964, the District Court denied appellant's motion by an order filed that day. On May 19, 1964 appellant filed its notice of appeal to this Court.

The jurisdiction of this Court is invoked under §2 of the Expediting Act, 15 U. S. C. §29, and is supported by *Terminal R.R. Ass'n* v. *United States,* 266 U. S. 17 (1924).

Uncertain whether the controversy is inside or outside "the mainstream of the litigation in which the Government is directly concerned" [*Shenandoah Valley Broadcasting Inc.* v. *ASCAP*, 375 U. S. 39 (1963)], petitioner has also filed a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit concurrently with this Jurisdictional Statement. (28 U. S. C. §1254(1); *Shenandoah, supra.*)

Questions Presented, Statutes Involved, Statement, The Questions Are Substantial

To avoid duplication, appellant requests that the Court consider in support of this appeal and as part of this Jurisdictional Statement, appellant's petition for a writ of certiorari filed concurrently herewith which appellant incorporates herein by reference.

Conclusion

The order and judgment of the District Court that appellant has no standing to enforce the Amended Judgment and that ASCAP did not violate the Amended Judgment are erroneous and should be reversed.

Respectfully submitted,

ROBERT A. DREYER
GEORGE A. KATZ
Attorneys for Appellant

WACHTELL, LIPTON, ROSEN, KATZ & KERN
Of Counsel

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No. 212

METROMEDIA, INC., *Appellant,*

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—and—

UNITED STATES OF AMERICA.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF APPELLEE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS TO DISMISS THE APPEAL OR TO AFFIRM

SIMON H. RIFKIND
575 Madison Avenue
New York 22, N. Y.

HERMAN FINKELSTEIN
575 Madison Avenue
New York 22, N. Y.
Attorneys for Appellee

JAY H. TOPKIS
ALLAN BLUMSTEIN
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
New York, N. Y.

CARL L. ZANGER
New York, N. Y
Of Counsel

July 1, 1965

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Rule 16, United States Supreme Court Rules 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

METROMEDIA, INC., *Appellant,* —*against*— AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *Appellee,* —and— UNITED STATES OF AMERICA	No. 212

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF APPELLEE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS TO DISMISS THE APPEAL OR TO AFFIRM

Appellee American Society of Composers, Authors and Publishers ("ASCAP") moves pursuant to Rule 16 of the Rules of this Court:

(a) to dismiss the appeal sought to be prosecuted by appellant from the judgment of the United States District Court for the Southern District of New York denying appellant's motion (i) to hold appellee in con-

tempt for its alleged refusal to comply with Section IX of the Amended Final Judgment of March 14, 1950 in this action, or, (ii) in the alternative, to direct plaintiff United States of America to move the District Court to have ASCAP punished for contempt, on the ground that the Expediting Act does not confer jurisdiction on this Court over this appeal; or, in the alternative,

(b) to affirm, without further argument, the judgment of the District Court, on the grounds that appellant has no standing to move to have appellee punished for contempt and that, in any event, appellee is not in contempt of the Amended Final Judgment.

Jurisdiction, Questions Presented and Statement

The judgment of the District Court was filed on March 25, 1964.

Thereafter, appellant relying on § 2, Expediting Act, 15 U. S. C. § 29,* filed its notice of appeal to this Court. Appellant also prosecuted an appeal to the United States Court of Appeals for the Second Circuit which affirmed the judgment of the District Court.

The judgment of the Court of Appeals was entered on March 8, 1965.

Concurrently with its jurisdictional statement, appellant has filed in this Court a petition for a writ of certiorari to review the judgment of the Court of Appeals.

To avoid duplication, appellee requests that the Court consider in support of this motion, appellee's brief in

*Section 2 of the Expediting Act provides:

"In every court action brought in any district court of the United States under [the antitrust laws], wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court." 32 Stat. 823 (1903), as amended, 15 U. S. C. § 29 (1952).

opposition to appellant's petition for a writ of certiorari which is being filed concurrently with this motion.

This motion presents the following additional question:

1. When a consent judgment in an antitrust suit brought by the United States has created private rights for the benefit of numerous non-parties, must this Court under the Expediting Act, entertain an appeal by a non-party, who has failed to follow the procedures expressly available to enforce its private rights, to review a determination by the District Court that: (a) such a non-party has no standing to move to have a party to the decree punished for contempt; and (b) the party to the decree is not in contempt.

Argument

I.

The Appeal Should be Dismissed

The decisions of this Court in *Shenandoah Valley Broadcasting, Inc.* v. *ASCAP,* 371 U. S. 540 (1963) and 375 U. S. 39 (1963), amended, 375 U. S. 994 (1964) are directly in point and require dismissal of the within appeal.

In *Shenandoah,* a group of television broadcasters brought a proceeding in the District Court to compel ASCAP to issue a special kind of license pursuant to the Amended Final Judgment. The District Court found that the Amended Final Judgment did not require ASCAP to issue the kind of license demanded by the television broadcasters and dismissed their petition. The broadcasters appealed directly to this Court relying on § 2 of the Expediting Act.

On motion of appellee ASCAP, this Court dismissed the appeal for want of jurisdiction, 371 U. S. 540 (1963).

Thereafter, the Court of Appeals for the Second Circuit dismissed the appeal perfected there by the broadcasters from the District Court decision on the ground that all appeals were routed to this Court by the Expediting Act, 317 F. 2d 90 (2d Cir. 1963).

The broadcasters then petitioned this Court for a writ of certiorari to review the decision of the Court of Appeals. This Court granted the petition and reversed the judgment of the Court of Appeals, 375 U. S. 39 (1963). This Court said (375 U. S. at 40):

> "The dismissal that we heretofore entered was based on our unexpressed view that the appeal from an ancillary order of this type was not within the Expediting Act. Direct appeals to this Court are authorized by that Act only from final judgments where the United States is a complainant. The purpose of the Act is to expedite litigation of 'great and general importance' where the Government is the aggrieved party. See 36 Cong. Rec. 1679 (1903). The controversy which is disposed of by the District Court's order is entirely between private parties and is outside the mainstream of the litigation in which the Government is directly concerned. Compare *Terminal R. R. Assn.* v. *United States*, 266 U. S. 17; *Aluminum Co. of America* v. *United States*, 302 U. S. 230."

The only difference between *Shenandoah* and the case at bar is that here appellant is seeking to use the device of a contempt proceeding, rather than the proceeding expressly made available to it by the Amended Final Judgment, to force ASCAP to issue the type of license desired by appel-

lant. But, here—as in *Shenandoah*—the District Court's order "is entirely between private parties and is outside the mainstream of the litigation in which the Government is directly concerned."

The Court of Appeals in the case at bar held that § 2 of the Expediting Act did not require that appellant's appeal be made directly to this Court. After reviewing the history and the circumstances of the *Shenandoah* cases, the Court of Appeals concluded (341 F. 2d at 1007):

> "... Metromedia's motion for contempt evolves from a private controversy between Metromedia and ASCAP over a matter that does not directly concern the United States—the determination of a licensing fee arrangement within the terms of the amended judgment."

Terminal R. R. Ass'n v. *United States*, 266 U. S. 17 (1924) does not require denial of appellee's motion. There the petitioner who was attempting to enforce the provisions of an antitrust decree by a contempt action was a co-defendant and a party to the decree.

II.

The Judgment of the District Court Should be Affirmed

If this Court does not dismiss this appeal, it should affirm, without further argument, the judgment of the District Court denying appellant's motion.

This appeal does not raise a substantial question warranting further consideration by this Court.

In support of appellee's motion to affirm, we incorporate here by reference appellee's brief in opposition to appellant's petition for a writ of certiorari to review the judg-

ment of the Court of Appeals in this action. For the reasons there stated, appellee's motion to affirm should be granted.

Conclusion

Appellee's motion to dismiss the within appeal or to affirm the judgment of the District Court without further argument should be granted.

Respectfully submitted,

SIMON H. RIFKIND
575 Madison Avenue
New York 22, N. Y.

HERMAN FINKELSTEIN
575 Madison Avenue
New York 22, N. Y.

Attorneys for Appellee

JAY H. TOPKIS
ALLAN BLUMSTEIN
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
New York, N. Y.

CARL L. ZANGER
New York, N. Y.
Of Counsel

July 1, 1965

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 211

METROMEDIA, INC., PETITIONER

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS and UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 212

METROMEDIA, INC., APPELLANT

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS and UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES IN OPPOSITION IN NO. 211

MOTION OF THE UNITED STATES TO DISMISS OR AFFIRM IN NO. 212

OPINIONS BELOW

The oral opinion of the district court (Def. App. 13a-19a)[1] is unreported. The opinion of the court of appeals (Pet. A1-A10) is reported at 341 F. 2d 1003.

JURISDICTION

Uncertain as to the proper appellate procedure, Metromedia, Inc., has filed a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit (No. 211) and, in the alternative, has docketed a direct appeal from the judgment of the United States District Court for the Southern District of New York (No. 212). The judgment of the court of appeals was entered March 8, 1965. The petition for a writ of certiorari in No. 211 was filed June 4, 1965. The jurisdiction of this Court in No. 211 is invoked under 28 U.S.C. 1254(1). The district court order was entered on March 25, 1964. The notice of appeal to this Court in No. 212 was filed on May 19, 1964. The district court extended the time in which to docket the appeal until [redacted] and the jurisdictional statement was filed on June 4, 1965. The jurisdiction of this Court on direct appeal is invoked under Section 2 of the Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. We submit, *infra*, p. 9, that this provision is inapplicable and that the appeal in No. 212 should be dismissed.

June 28 1965

[1] "Def. App." refers to the "Brief and Appendix of Defendant-Appellee" in the court of appeals.

QUESTION PRESENTED

Whether a nonparty may initiate a proceeding in a government antitrust suit for contempt of a consent judgment, where the consent judgment explicitly establishes a different district court procedure through which such a nonparty may enforce the judgment against the defendant.

STATEMENT

ASCAP is an organization of composers, authors, and publishers organized for the purpose of licensing the performance of its members' copyrighted works and protecting them against infringements. In 1941, the United States filed a complaint charging ASCAP with having violated Section 1 of the Sherman Act. The suit was settled by a consent decree, subsequently amended in 1950 and in 1960 (Pet. A3). The decree regulates the relations of ASCAP to its members and sets the terms upon which ASCAP is to issue licenses for the public performance of copyrighted works in its repertory. As pertinent here, the decree requires ASCAP to "grant to any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory" (Decree, Section VI, Pet. App. 9a).[2] Upon receipt of an application for a license, ASCAP is required to "advise the applicant in writing of the fee which it [ASCAP] deems reasonable for the license requested" (Decree, Section IX(A), Pet. App. 11a). If the parties are

[2] "Pet. App." refers to the "Appendix of Petitioner-Appellant, Metromedia, Inc.," in the court of appeals.

unable to agree upon a mutually acceptable fee within 60 days of the filing of the application, the applicant "may forthwith apply to this Court [the District Court for the Southern District of New York], for the determination of a reasonable fee * * *" (*ibid.*).[3] Section XVII of the decree specifically confers upon the "parties" to the judgment the right to apply to the district court for "further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out of this Judgment, for the modification thereof, for the enforcement of compliance therewith and for the punishment of violations thereof" (Pet. App. 17a).

Metromedia owns and operates ten radio stations which use compositions licensed by ASCAP. From January 1, 1959, to December 31, 1963, these stations operated under a so-called blanket license which authorized Metromedia to use all of the ASCAP repertory and which provided for computation of royalty payments under a standard formula used in such ASCAP licenses to radio stations. This formula was based in part upon the stations' "net receipts from sponsors" after certain deductions and in part upon their advertising rates. On December 23, 1963, Metromedia applied for a blanket license under which royalty payments would be computed pursuant to a different formula based upon gross, rather than net, receipts from sponsors, with a lower percentage to be

[3] In such a proceeding, ASCAP has the burden of establishing that the fee it seeks to charge is reasonable. ASCAP is also required to give the Attorney General notice of the court proceeding (Decree, Section IX(A), Pet. App. 11a).

charged for that portion of gross receipts exceeding the gross receipts for the year 1962.[4] ASCAP declined to quote a royalty fee computed on this basis. Instead of instituting a proceeding "for the determination of a reasonable fee" in the district court under Section IX of the amended decree, Metromedia demanded that the United States commence a civil contempt proceeding against ASCAP (Pet. A5-A6). The United States declined (Pet. A6).[5]

Metromedia then moved the district court to hold ASCAP in contempt for failure to comply with the amended decree, or, in the alternative, to direct the United States to initiate a contempt action. Both motions were denied (Pet. A6). Because of doubt regarding the proper review procedure, Metromedia filed a notice of direct appeal from the district court's decision in this Court and also prosecuted an appeal to the court of appeals. The court of appeals (Pet. A1-A10) held (1) that it had jurisdiction of the appeal, (2) that Metromedia had no standing to bring the contempt action, and (3) that even if Metromedia were to be

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[4] Metromedia contends that its proposed royalty formula will avoid burdensome accounting problems associated with the net-receipts formula and will remedy a discrimination against it which results from the net-receipts method (Def. App. 6a-8a).

[5] The government at first declined to initiate such a proceeding until the Court of Appeals for the Second Circuit had rendered its decision in *United States* v. *ASCAP, Application of Shenandoah Valley Broadcasting, Inc.*, 331 F. 2d 117, certiorari denied, 377 U.S. 997 (Pet. A6). Thereafter, having made a full review of the facts, the government decided that a civil contempt proceeding was not justified.

deemed to have standing, the allegations did not show any violation of the consent decree since "[t]hus far it is Metromedia—not ASCAP—which has failed to follow the route marked out by the decree" (Pet. A10).

ARGUMENT

1. The court of appeals correctly held that Metromedia lacked standing to maintain a contempt proceeding against ASCAP for violation of the decree entered in the government antitrust suit. Petitioner was not a party to the proceedings initiated by the United States which resulted in the consent judgment against ASCAP and had no right to intervene, had it sought to do so. *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683. While Metromedia may, of course, bring a civil antitrust suit against ASCAP (*id.* at 689),[6] it does not have standing to enforce the government decree, except as provided therein. *United States* v. *Paramount Pictures, Inc.*, 75 F. Supp. 1002, 1004 (S.D. N.Y.); cf. *Restatement of the Law of Judgments*, §§ 79, 93. By its terms, Section

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[6] *Minnesota Mining and Mfg. Co.* v. *New Jersey Wood Finishing Co.*, No. 291, O.T., 1964, decided May 24, 1965, upon which Metromedia relies, deals with one of the procedural benefits enjoyed by private antitrust plaintiffs—tolling of the statute of limitations during the pendency of a government proceeding. Congressional solicitude for antitrust plaintiffs has been expressed by conferring this and other advantages applicable in private suits. Congress has not, however, conferred upon private parties the power directly to enforce decrees obtained by the government.

XVII of the decree permits only the "parties" to apply for enforcement orders. This limitation *a fortiori* applies to the initiation of contempt proceedings.

This result rests upon sound considerations. The Attorney General properly has the broadest discretion in deciding to initiate suits under the antitrust laws and in negotiating and agreeing upon consent decrees (*Swift & Co.* v. *United States*, 276 U.S. 311, 331-332; *United States* v. *Ward Baking Co.*, 376 U.S. 327). As the court of appeals held, this discretion "requires continuing control over the suit to determine, for instance, when modification of the decree might be a preferable alternative to attempting to enforce it through one or more contempt proceedings. * * * Leaving the choice and power to enforce or modify in the government's hands achieves a desirable result. It forecloses the possibility that a multitude of parties with conflicting interests will become entangled in subsequent proceedings in the action, and at the same time the continuing government supervision affords those parties affected by the decree sufficient protection of their rights" (Pet. A9). The risks of multiple and chaotic litigation are especially apparent in this case, where ASCAP has more than 30,000 licensees, all of whom are, like Metromedia, beneficiaries of the consent decree.

Petitioner's position that it has standing derives no independent support from Rule 71 of the Federal Rules of Civil Procedure, which permits a nonparty to enforce an order which has been "made in favor" of that person. The consent judgment was "in favor"

of the United States, not Metromedia.[7] Should Metromedia bring a proceeding under Section IX of the judgment, the district court might then enter orders explicitly "in favor" of it as to which Rule 71 would be applicable.

2. Metromedia, moreover, has a wholly adequate remedy which it has thus far chosen not to pursue. Section IX of the consent decree clearly prescribes the procedure to be followed by license applicants who claim a violation of the decree's provision requiring ASCAP to grant licenses on reasonable terms. If the fee quoted by ASCAP is deemed unreasonable, Metromedia "may forthwith apply to this Court [the district court] for the determination of a reasonable fee." As the district judge explicitly held in this case, it is clear that petitioner's contentions that ASCAP has violated the terms of the consent decree in refusing to quote a fee based upon the formula proposed

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[7] Rule 71 would apply if a judgment expressly named a nonparty as a beneficiary thereof or otherwise expressly confered upon a nonparty the right of enforcement (see *United States* v. *Hackett*, 123 F. Supp. 104 (W.D. Mo.); *Woods* v. *O'Brien*, 78 F. Supp. 221 (D. Mass.); cf. *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502). In addition, in one government antitrust case, the district court held that a nonparty had the right to seek enforcement, although not specifically conferred by the judgment, since no procedure under the judgment was established to permit him to vindicate his rights. *United States* v. *Vehicular Parking*, 7 F.R.D. 336 (D.C. Del.); see also *In re Paleais*, 296 Fed. 403 (C.A. 2); *Secor* v. *Singleton*, 35 Fed. 376 (C.C.E.D. Mo.). This doctrine does not apply here, since the present consent judgment provides a remedy whereby Metromedia may challenge the reasonableness of ASCAP's offered formula or fee.

by petitioner, rather than on ASCAP's standard formula, is fully litigable in a proceeding under Section IX.[8] Petitioner offers no explanation as to why it has failed to pursue this available remedy.

3. The appeal in No. 212 should be dismissed for lack of jurisdiction in this Court. Under Section 2 of the Expediting Act, 15 U.S.C. 29, a direct appeal lies to this Court from final judgments in civil antitrust actions brought by the United States, but not when the controversy "is entirely between private parties and is outside the mainstream of the litigation in which the Government is directly concerned." *Shenandoah Valley Broadcasting, Inc.* v. *ASCAP*, 375 U.S. 39, 40. *Shenandoah* concerned the same ASCAP decree here at issue, the controversy being whether ASCAP was required to issue a type of license sought by the appellants in that case. Should the Court, however, deem the district court's judgment to be within the Expediting Act, we submit, for the reasons given above, that the judgment was clearly correct and should be affirmed.

---

[8] In denying Metromedia's motions, the district judge said:

> I think the most that you can do here is to ask for a blanket license, and then on return of their offer you can ask for a hearing and urge, as you do now, that fixing it on the basis of net receipts is manifestly unjust and discriminatory and violates section 8 of the decree.

The judge went on to encourage Metromedia to bring such a proceeding, to state that he would seriously consider its contentions, and to encourage ASCAP to negotiate seriously with Metromedia over its suggested changes in the license (Def. App. 14a-17a).

CONCLUSION

The petition for a writ of certiorari in No. 211 should be denied, and the appeal in No. 212 should be dismissed or, in the alternative, the judgment in that case should be affirmed.

Respectfully submitted.

RALPH S. SPRITZER,
Acting Solicitor General.

DONALD F. TURNER,
Assistant Attorney General.

LIONEL KESTENBAUM,
I. DANIEL STEWART, JR.,
Attorneys.

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PETITIONER'S REPLY BRIEF IN NO. 211

APPELLANT'S BRIEF OPPOSING APPELLEES' MOTIONS TO DISMISS OR AFFIRM IN NO. 212

ROBERT A. DREYER
277 Park Avenue
New York, New York 10017

GEORGE A. KATZ
230 Park Avenue
New York, New York 10017

Attorneys for Petitioner and Appellant

WACHTELL, LIPTON, ROSEN, KATZ & KERN
of Counsel

September 14, 1965

IN THE

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OCTOBER TERM, 1965

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PETITIONER'S REPLY BRIEF IN NO. 211

APPELLANT'S BRIEF OPPOSING APPELLEES' MOTIONS TO DISMISS OR AFFIRM IN NO. 212

The Real Issue

The issue really posed by this case is whether an adjudicated monopolist, operating under the compulsory licensing provisions of an antitrust decree, may perpetuate the anticompetitive practice of forcing a single form of license of its own devising upon all radio stations.

The licensing fee arrangement sought by Metromedia is concededly "within the terms of the amended judgment" (Opinion below, Pet. A-7); no one challenges the reasonableness of the form of license sought by Metromedia. The sole basis for ASCAP's refusal to quote a fee for the kind of license sought by Metromedia is ASCAP's unwillingness to issue "different forms of license" (R. Vol. I, p. 31a) and its claim that the decree requires that an ASCAP license "has got to be uniform for all local stations" (R. Vol. II, p. 17a). Despite the absence of any factual issues, ASCAP having conceded that this case only involves "a matter of law" (R. Vol. II, p. 3a), the question of Metromedia's entitlement to a reasonable license within the terms of the decree remains unanswered.

Respondents have not met the substantial issue, claiming it is raised by the wrong party in the wrong proceeding. ASCAP's position here is belied by its own contradictory arguments elsewhere. The government's position here is undermined by its own concessions.

ASCAP's Bad Faith

The bad faith of ASCAP is revealed by a comparison of its argument to this Court and its argument to the District Court in another proceeding now pending under the same Amended Judgment. In its brief to this Court (pp. 11-12) ASCAP argues that Metromedia—in its endeavor to secure a form of license suited to its needs—has a complete remedy under Section IX of the Amended Final Judgment:

> "Particularly is the result reached by the Court of Appeals sound where the Amended Final Judgment grants a remedy to would-be users of ASCAP music—the right to apply under Section IX to the District Court for determination of a reasonable license fee. Both Chief Judge Ryan and the Court of Appeals recognized that a denial of petitioner's motion did not leave petitioner remediless.
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> "It is precisely because petitioner has an explicit remedy under Section IX of the Amended Final Judgment that this case does *not* raise the issue of the denial of enforcement rights to private parties who are beneficiaries of civil antitrust decrees entered in Government actions."

In a Section IX rate proceeding now pending in the District Court for a television license, ASCAP argues that the form of license is not litigable. ASCAP's Memorandum in Response to Petitioner's "Tentative Statement of Issues," February 10, 1965, in *Shenandoah Valley Broadcasting, Inc.* v. *ASCAP,* Civil Action No. 13-95, states:

"The only issue for the Court to decide in this proceeding, as Section IX of the Amended Final Judgment makes crystal clear, is what is 'a reasonable fee' for the blanket and per program licenses which television stations have sought and obtained from the Society for over 15 years.

"The pleadings raise no other issue. Indeed, no other issue could be raised in a proceeding brought under Section IX of the Amended Final Judgment. (p. 2)

* * * *

"Moreover, under Section IX of the Amended Final Judgment, the Court is required only to make a determination as to 'a reasonable fee'. The Court is not required to rewrite the many provisions of the ASCAP blanket and per program licenses that relate to matters other than the reasonableness of the fee." (p. 7)

Thus, in this Court ASCAP argues that review should be denied because the licensee has an adequate remedy in the District Court under Section IX to obtain an authorized but different form of license. In the District Court, ASCAP argues that a licensee has no such remedy.

ASCAP also attributes to Metromedia an argument it has never made, viz., that ASCAP must "grant every user his own special license" (ASCAP Br., p. 13). Metromedia's argument is simply that absent any issue over the reasonableness and propriety of the blanket license sought by it, ASCAP must quote a fee thereon. ASCAP's reluctance to grant Metromedia a different form of license stems from ASCAP's unwillingness to permit radio stations to have a choice

of licenses. (R. Vol. I, p. 31a). However, as this Court said in *United States* v. *Paramount Pictures,* 334 U.S. 131, 159 (1948):

> "But the policy of the antitrust laws is not qualified or conditioned by the convenience of those whose conduct is regulated. Nor can a vested interest, in a practice which contravenes the policy of the antitrust laws, receive judicial sanction."

This is a Section IX Proceeding

Both ASCAP and the United States argue that Section IX of the Amended Judgment affords Metromedia an adequate remedy which it has not pursued. The fact is that Metromedia *is* proceeding under Section IX.

As the record demonstrates, Metromedia's request to ASCAP stated: "The within application is made pursuant to Section IX of the amended final judgment . . ." (R. Vol. I, p. 65a). The government concedes that Section IX of the Amended Judgment requires ASCAP to advise the applicant of the fee which ASCAP deems reasonable "for the license requested" (U.S. Br., p. 3). The government then notes that if the parties are unable to negotiate a mutually agreeable fee within 60 days thereafter, the applicant may petition the District Court for the determination of a reasonable fee in which proceeding ASCAP has the burden of establishing the reasonableness of the fee it seeks to charge (U.S. Br., p. 4).

The government also concedes that Metromedia is one of the "beneficiaries of the consent decree" (U.S.

Br., p. 7), and that the controversy as to whether ASCAP must issue the type of license sought "is entirely between private parties and is outside the mainstream of the litigation in which the Government is directly concerned" (U.S. Br., p. 9).

Finally, in its statement of the Question Presented, the government concedes that Metromedia may enforce the judgment against the defendant, but in "a different district court procedure" (U.S. Br., p. 3).

When ASCAP refused to quote, as required by Section IX, claiming that it did not have to issue "different forms of license," Metromedia made this motion, expressly pursuant to Section IX, to procure a determination of ASCAP's duty to comply with Section IX and quote a fee (R. Vol. I, pp. 21a-22a, 24a-25a).

The motion was not an attempt to usurp the government's prerogative of initiating contempt proceedings for enforcement of the decree. Rather, it was simply a procedure to secure the right specifically conferred upon an applicant to the quotation of a fee on a form of license authorized by the decree. The distinction is vital. Metromedia concedes that it could not maintain contempt proceedings for a violation by ASCAP of one of the general injunctions of the Amended Judgment. Thus, if ASCAP flouted a provision of Section IV(A)-(H), Metromedia would have to accept the government's action or inaction. However, when Metromedia initiates a Section IX proceeding, which is "entirely between private parties," Metromedia may compel ASCAP to follow the route marked out by Section IX.

Apparently, the government and ASCAP contend that a Section IX proceeding is not initiated until a petition has been filed in the District Court for the determination of a reasonable fee. Such a reading of the decree ignores the expressly required prior steps of quotation and negotiation, as well as the provision casting upon ASCAP the burden of establishing the reasonableness of a fee theretofore quoted by it.

Conclusion

Again we emphasize that the only real issue is whether ASCAP may dictate the terms of its licenses. If ASCAP can dictate the terms of its licenses with complete disregard for the needs of the licensee, then the Amended Judgment does not curb the ASCAP monopoly; it furthers it.

Respectfully submitted,

ROBERT A. DREYER
GEORGE A. KATZ
Attorneys for Petitioner and Appellant

WACHTELL, LIPTON, ROSEN, KATZ & KERN
Of Counsel